Supreme Court, U.S.
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Nos. 85-2077 and 86-372

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

BILLY BRYAN, ARTHUR COMER,
GEORGE BULLARD and CHARLIE GREENE,
(No. 85-2077)

and

UNITED STEELWORKERS OF AMERICA,
(No. 86-372)

Petitioners,

vs.

ELBERT ERKINS, SAMUEL DENSON,
and U.S. FIDELITY & GUARANTY CORP.,

Respondents.

On Petitions For Writs Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF RESPONDENTS ELBERT ERKINS AND SAMUEL DENSON IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether certiorari, having once already been denied, should now be granted on the issue of LMRDA §501 union membership enforcement, in view of the factual nature of the issue and the absence of any conflict among the Courts of Appeals on the issue?

2. Whether certiorari should be granted to reconsider the unanimous decisions of the lower federal courts that the timeliness of §501(b) fiduciary accounting proceedings is determined in equity by principles of laches and on the basis of those principles this equitable accounting action was timely?

3. Whether certiorari should be granted to consider the unbroken line of authority, indicating the absence of any conflict among the Courts of Appeals, and extending over twenty years and thirty federal judges, that §501(b) allows common-benefit attorneys' fee awards and authorizes fee awards to exceed the amount of the funds recovered in §501(b) equitable accounting proceedings?

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

TABLE OF AUTHORITIES 4

INTRODUCTION 8

OPINIONS BELOW 8

JURISDICTION 9

STATUTES INVOLVED 9

STATEMENT OF THE CASE 10

The Fair Representation Suit . . . 10

Union Membership 11

Timeliness 15

Attorneys' Fees 20

Steelworkers' Status 28

REASONS FOR NOT GRANTING THE WRIT . . . 34

I. The Membership Issue 34

II. The Timeliness Issue 41

III. The Attorneys' Fees Issue . . 43

CONCLUSION 52

TABLE OF AUTHORITIES

Cases Cited

Alvey vs. General Electric Company, 622 F.2d 1279 (7th Cir. 1980) 39

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 48

Axelrod v. Stoltz, 264 F. Supp. 536 (E.D. Pa. 1967) 39

Bakery and Confectionary Workers v. Ratner, 335 F.2d 691 (D.C. Cir. 1964) 49,51

Basilicato v. International Alliance, 479 F. Supp. 1232 (D. Conn. 1979) . . . 39

Brink v. DaLesio, 453 F. Supp. 272 (D. Md. 1978) 48

Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) 41,43

Donovan v. CSEA Local Union 1000, 784 F.2d 98 (2nd Cir.), cert. denied, ____ U.S. ____, 55 U.S.L.W. 3219 (1986) 49

Erkins v. Bryan, 663 F.2d 1048 (11th Cir. 1981), cert. denied, 459 U.S. 989 (1982) 8,11,34

Erkins v. Bryan, 598 F. Supp. 240 (M.D. Ala. 1984), aff'd, 785 F.2d 1538 (11th Cir. 1986) 25,43,51

Erkins v. Bryan, 785 F.2d 1538 (11th Cir. 1986) . . . 34,41-44,50,51

Erkins v. United Steelworkers of America, 723 F.2d 837 (11th Cir.), cert. denied, 467 U.S. 1243 (1984) . . . 10

Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967) 43,46,48,49

Hall v. Cole, 412 U.S. 1 (1973) 44,46,48

Highway Truck Drivers Local 107 v. Cohen, 220 F.Supp. 735 (E.D. Pa. 1963) 49,51

Holmberg v. Armbrecht, 327 U.S. 392 (1946) 42

Hughes v. Local Eleven International Association of Bridge Workers, 287 F.2d 810 (3rd Cir. 1960) 39

Johnson v. Georgia Highway Express, 488 F.2d 714 (5thCir. 1974) 23,24

Johnson v. Nelson, 325 F.2d 646 (8th Cir. 1963) 51

Kerr v. Shanks, 466 F.2d 1271 (9th Cir. 1972) 51

Local 92, International Association of Bridge Workers v. Norris, 383 F.2d 735 (5th Cir. 1967) 42,50

Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) 48,49

Milone v. English, 306 F.2d 814 (D.C. Cir. 1962) 51

Monzillo v. Biller, 735 F.2d 1456 (D.C. Cir. 1984) 51

Morrissey v. Curran, 483 F.2d 480 (2nd Cir. 1973) 51

Morrissey v. Curran, 482 F. Supp. 31 (S.D. N.Y. 1979) 41

Moschetta v. Cross, 241 F. Supp. 347 (D. D.C. 1964), on remand from 335 F.2d 691 51

Philadelphia Div. v. Pennsylvania Tel. Guild, 573 F. Supp. 314 (E.D. Pa. 1983) 51

Phillips v. Osborne, 403 F.2d 826 (9th Cir. 1968) 48

Ratner v. Bakery and Confectionary Workers, 354 F.2d 504 (D.C. Cir. 1965) 51

Retail Clerks Local 648 v. Retail Clerks Int. Ass'n, 299 F. Supp. 1012 (D. D.C. 1969) 51

Shimman v. Local 18, International Union of Operating Engineers, 744 F.2d 1226 (6th Cir. 1984) 43,50

Taylor v. Great Lakes Seaman's Union, Local 5000, 701 F.2d 590 (6th Cir. 1983) 39

Usery v. Local 639, I.B.T., 543 F.2d 369 (D.C. Cir. 1976) 49,51

Yoblonski v. U.M.W., 80 L.R.R.M. (BNA) 2594 (D. D.C. 1971) 41

Statutes Cited

29 U.S.C. 411(a)(1) 40

29 U.S.C. 501 18

29 U.S.C. 501(b) . . . . . 1 et seq.

Other Authorities Cited

1 Leg. Hist. of LMRDA of 1959 (NLRB 1959) 45

Comment: Counsel Fees For Union Officers Under The Fiduciary Provision Of Landrum-Griffin, 73 Yale L. J. 443 (1964) 51

Elliott Bill, H.R. 8342, 86th Cong. 1st Sess., 1959 44,45

Griffin Bill, H.R. 8400 45

Kennedy-Ervin Bill, s.1555, §109(b) . . 45

Securities Exchange Act of 1934, §14(a) 49

INTRODUCTION

The respondents, Elbert Erkins and Samuel Denson, request that this Court deny the petitions for writs of certiorari to review the decision of the Court of Appeals for the Eleventh Circuit entered on April 8, 1986 because that decision does not conflict with any decision of this Court or of any federal Court of Appeals, and there are no other special and important reasons for granting the writs.

OPINIONS BELOW

Respondents accept petitioners' statements of the opinions below with the single notable exception of the trial court's opinion, upon remand from 663 F.2d 1048 (11th Cir. 1981), cert. denied, 459 U.S. 989 (1982), on the merits of the §501

accounting, which is reprinted at R. App. A-1.

JURISDICTION

Respondents agree with the statements of jurisdictional grounds set forth in the petitions for writs of certiorari.

STATUTES INVOLVED

Respondents agree with the petitioners' identification of the statutes involved.

STATEMENT OF THE CASE

The petitioners in both petitions fail to state the facts fully and accurately. Therefore, plaintiffs-respondents supplement and correct those statements as follows.

The Fair Representation Suit

Petitioners in No. 85-2077 state that a suit (denominated by them as "Erkins II") initiated by plaintiffs-respondents herein and dismissed for untimeliness was "a second suit in equity ..." (Pet. 6) That is incorrect; the suit was a class action on behalf of all the union members who lost their jobs against the union for damages for breach of the duty of fair representation. Erkins v. United Steelworkers of America, 723 F.2d 837 (11th Cir.), cert. denied, 467 U.S. 1243 (1984). The individual petitioners sought unsuccessfully in both

the trial and appellate courts below to argue that the fair representation limitations' principle should control the §501 timeliness issues.

Union Membership

Petitioners in both No. 85-2077 and No. 86-372 incorporate only select facts on the issue of membership standing to enforce §501. (No. 85-2077 Pet. 5-7; No. 86-372 Pet. 3, 5, 9-10) The facts of membership were set forth in the original decision of the Court of Appeals in Erkins v. Bryan, 663 F.2d 1048 (11th Cir. 1981), cert. denied, 459 U.S. 989 (1982), were stipulated in the trial court upon remand and trial of the merits, and formed the basis for the instant decision of the Court of Appeals, for which review is sought, that "findings of fact ... [affirmed] by an appellate court

bind all subsequent proceedings on the same case ...." (No. 86-372, App. 4a)

Respecting the issue of the membership status of Erkins and Denson at the time of the commencement of the action, in addition to the facts set forth in the original opinion of the Court of Appeals, the following undisputed facts should be noted. Erkins and Denson were members in good standing of both the Steelworkers and the local throughout the duration of the strike between December, 1976 and July, 1978. Decertification of a local union as bargaining representative has no effect at all upon the continued existence of the local union; it means only that certified bargaining representative status from the NLRB is lost. When the union was decertified the Steelworkers put the local under the control of an administrator for purposes of "winding up" its affairs, presumably because it was a single-

bargaining unit local union. The local union, however, has never finally been wound up, and its existence and chartering are still in effect. Neither Erkins nor Denson has ever voluntarily withdrawn from nor been suspended nor expelled from the union's membership. Each remains fully within the Steelworker's constitutional definition of eligibility for membership. There has been no termination of the union either pursuant to the procedures established under the Landrum-Griffin Act with the United States Department of Labor or pursuant to internal union procedures within the Steelworkers. Indeed, the local union treasury last reflected a continuing balance of approximately $2,000, and the bank accounts from which the misappropriations occurred continued. While it is true that Erkins and Denson have not paid union dues since October, 1978, that fact alone is misleading, because Erkins and Denson have

not been obligated to pay dues, by virtue of the application of the out-of-work waiver of dues provisions of the Steelworkers' constitution. Moreover, Erkins and Denson as employees retain recall rights with the employer, as well as transfer rights within the union. Thus, should they be recalled, or should they obtain employment with another employer that recognizes a local union affiliated with the Steelworkers, then their active dues obligation would immediately, without more, recur. It is on the basis of all these facts, together with the facts stated in its opinion, that the Eleventh Circuit Court of Appeals concluded originally that Erkins and Denson made a sufficient showing of local union membership at the time of the initiation of the §501(b) suit to warrant the issuance of leave to proceed.

Timeliness

Petitioners in No. 85-2077 distort both the record facts and the trial court's analysis of those facts in their treatment of the issue of plaintiffs-respondents' timeliness in commencing this §501 action. The trial court analyzed the facts concerning timeliness (R. App. A-20-36), and the appellate court accepted that analysis. (No. 86-372 App. 8a) Some further exposition of those facts is necessary.

The initial concern of the union membership in June, 1979 was the loss of the strike. At a meeting on June 10, 1979 Steelworkers International representative, Caldwell, told plaintiffs, Erkins and Denson, that the union lawyers had not advised the strike leaders correctly regarding the right of the members to vote in the union decertification election. Caldwell also told Erkins and Denson that

the union lawyers had filed charges with the NLRB against the company, but that these charges were dismissed. A cousin of plaintiff Erkins lived in Milwaukee and this is how Milwaukee attorney Thomas M. Jacobson became known to the plaintiffs. At a meeting in late June, 1979 Jacobson was informed of Caldwell's statements but stated he could not take the case until a retainer was paid to provide for costs and expenses. The plaintiffs returned to Jacobson's office on October 30, 1979 with the money to retain his services. Jacobson researched the law and in November, 1979 corresponded with the Steelworkers regarding internal procedures available to the membership to obtain answers for their concerns as to why the strike was lost. The Steelworkers' response was unsatisfactory.

On November 30, 1979 Jacobson went to Eufaula, Alabama, and a meeting was held at a Baptist church in Eufaula where the

plaintiffs as well as other union members discussed the concerns of those present as to why the strike was lost. Denson thought the company and the union leaders were all in on it together; he was suspicious that the company bought the union leaders off--paid them off. It was at this meeting that Erkins and Jacobson received information from union member, J. L. Pittman, which in turn resulted in an early morning meeting on December 1, 1979 with Sandra and Walter Ward. Sandra Ward showed cancelled checks for the period April-May, 1978 to Jacobson. The Wards had not previously shared the cancelled checks with anyone from the union membership. It was not until the early-morning meeting with the Wards on December 1, 1979 that the strike leaders, individual petitioners herein, clearly surfaced as the target for concern over why the strike was lost.

After this information was received, Jacobson again contacted Steelworkers in December, 1979 and, receiving no response, yet again in Janaury, 1980. His correspondence specifically requested the Steelworkers, pursuant to 29 U.S.C. §501, to file suit against the strike leaders, individual petitioners here, for violating their fiduciary responsibilities to the membership during the strike. On January 16, 1980 the Steelworkers' response was received, refusing the demand to file suit. Thereafter, Jacobson obtained in hand an affidavit from Sandra Ward containing the cancelled check expenditures for the period April-May, 1978. This information was furnished to the Steelworkers on February 11, 1980. The membership renewed its request that Steelworkers commence suit for an accounting pursuant to §501.

A Steelworkers' response on February 15, 1980 was indicative of some willingness to pursue the union members' request and therefore additional contact was made. Jacobson told the Steelworkers about personal property of substantial value which the strike leaders had accumulated at the end of and shortly after the strike. On March 6, 1980 Steelworkers changed its position and refused to file suit or otherwise pursue the plaintiff union members' request and, instead, turned over Local 7326's strike records to the U.S. Department of Labor.

Between March 6, 1980 and May 1, 1980 plaintiffs' attorney searched for and retained local counsel and drafted pleadings. A federal judge had to be found to obtain permission for the filing of the §501 lawsuit; Judge Varner was ill during this period of time; Judge Johnson had recently been elevated to the Eleventh

Cirucit Court of Appeals. Shortly after Judge Truman Hobbs was confirmed, Jacobson and the plaintiffs went to Montgomery, Alabama, and received the trial court's permission to file the suit on May 1, 1980. Thus, even if a six-month limitations' period was applied to this case, the action was timely commenced.

Attorneys' Fees

Petitioners in both No. 85-2077 and No. 86-372 incorporate limited and incomplete facts respecting plaintiffs-respondents' entitlement to attorneys' fees. (No. 85-2077 Pet. 14 & n. 11; No. 86-372 Pet. 7-8) A brief examinaton of the record reveals the enormous amout of fact development and legal research that went into plaintiffs-respondents' effort to enforce what was

regarded by Congress as the key fiduciary provision of LMRDA.[1]

For this quantity of representation, plaintiffs' counsel claimed 1,649 hours, all supported by contemporaneous time records, none of which was duplicative. All time spent by plaintiff's counsel on the parallel criminal and fair representation litigation was excluded from this computation. In

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[1] The docket entry sheets in this case themselves run to a dozen pages and reveal complete legal research on the legislative history of §501 and its interpretation respecting "membership," standing, conditions precedent, notice and claim, showing of "good cause," fiduciary violations, the remedy of accounting, intervention, indemnification, timeliness, costs, interest, fees, parallel criminal litigation, disqualification, and analogies to shareholder derivative litigation; investigation and examination of approximately 6500 documents; nearly a dozen depositions; the presentation of fourteen witnesses at the accounting hearing; dozens of motions and briefs; three full-dress appeals; briefing on an earlier petition for certiorari; travel and communications from far-away distances; and an incalculable host of meetings, telephone calls, memos, smaller research projects, correspondence, and affidavits.

short, on the record, the quantification of plaintiffs' counsel's time was conservative and limited to the essence of their representation.[2]

Plaintiffs-respondents' counsel valued their time at $125.00 per hour for Mr. Jacobson and Mr. Kelly and $80.00 per hour for Mr. Grubb. Mr. Jacobson valued his travel time at 20% of his average hourly fee. These hourly rates were well within the prevailing market rate for this kind of representation in the Alabama federal courts

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[2] The record on quantification consisted of the original affidavits of Thomas M. Jacobson (R. 704-729), Walter F. Kelly (R. 730-738), and William I. Grubb, II (R. 691-695), with attached contemporaneous time records, the master affidavit of Walter F. Kelly (R. 697-703), the reply affidavit of Thomas M.Jacobson (R. 826-829), and the reply affidavit of Walter F. Kelly (R. 817-819). These documents evidenced, <u>without rebuttal</u>, that plaintiffs' counsel allocated work to avoid duplication, maintained contemporaneous time records, accumulated assignments to save time, excluded time spent on the parallel fair representation litigatin, and were required to deal with difficult obstacles erected by defense counsel and Steelworkers' counsel.

in this kind of litigation, as attested by two highly respected Alabama attorneys with federal trial practices and 58 years of Alabama trial experience between them.[3]

Plaintiffs-respondents' counsel all have considerable trial experience and high reputations for professional excellence, including various awards and professional recognition, as well as formidable results obtained in a wide variety of litigation. All the Johnson factors were met by plaintiffs-respondents' counsel;[4] indeed,

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[3] The record on hourly rates and prevailing market rates consisted of the original affidavits of Thomas M. Jacobson (R. 704-729), Walter F. Kelly (R. 730-738), William I. Grubb, II (R. 691-695), Jack E. Held (R. 820-823), and Maury D. Smith (R. 823-826).

[4] Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974). The record on the satisfaction of the Johnson factors consisted of the original affidavits of Thomas M. Jacobson (R. 704-729), Walter F. Kelly (R. 730-738), William I. Grubb, II (R. 691-695), the master affidavit of Walter F. Kelly (R. 700-702), the fee petition (R. 697-698), the fee petition brief (R. 739-752), and reply brief (R. 802-816).

not a single Johnson factor disfavored fee compensation, while nearly all such factors affirmatively favored fee compensation.

The plaintiffs-respondents retained Mr. Jacobson's firm on the basis of an initial $10,000 flat fee agreement with an ongoing hourly fee thereafter. This fee agreement was thereafter modified to reflect the facts that all initial retainer fees were devoted to costs and expenses, and that counsel could receive as fees only whatever could be obtained by recovery under §501, LMRDA. The fee requested in the case thus conformed to the fee agreement. In fact, the entire retainer fee was utilized for costs and expenses, and Mr. Jacobson's firm advanced an additional $3,000 for further costs and expenses.

On the basis of this substantial and uncontradicted factual record, plaintiffs-respondents' counsel computed 1,428.50 hours at $125.00 per hour, plus 93 (travel) hours

at $25.00 per hour, plus 127.50 (local counsel) hours at $80.00 per hour, for a "lodestar" of $203,587.50 for 1,649 total hours, at an average hourly rate of $123.40, a rate well within the prevailing market range in the Alabama federal trial courts for litigation of this complexity.

The trial court awarded a fee of $42,000, prejudgment interest at the legal rate from July 14, 1978, and costs of $3,123.99. Erkins v. Bryan, 598 F. Supp. 240 (M.D. Ala. 1984). Without substantiation, and based upon conjecture unsupported by the record, the trial court reduced plaintiffs' counsels' hours to "hundreds of hours," or by inference from the trial court's "lodestar-only" estimation to between 950 and 1000 hours, or to "a thousand or more productive hours." Also, in the face of uncontradicted affidavits respecting the market reasonableness of

counsels' hourly rates, the trial court set the lodestar hourly rate at $90.00 per hour.

Even though the trial court determined, on the basis of the fee petition and supporting materials "more than adequate to serve as a basis for an informed decision," that "in order to secure this judgment against defendants, plaintiffs had to overcome difficult legal and factual obstacles that arose during the course of this protracted litigation," that "... plaintiffs conferred some benefit upon the union which is in excess of their monetary judgments," that "plaintiffs were represented by able, dedicated attorneys," who "demonstrated skill and tenacity in persevering in the representation of their clients, despite many obstacles," that based upon the lodestar, "the fee should be no less than $95,000.00 to $100,000.00," that "the case presented a novel question on the issue of standing that was resolved in favor

of plaintiffs on appeal," that "plaintiffs' proof depended on the difficult chore of assembling and reviewing numerous checks in an effort to make sense out of the local's chaotic financial records," that plaintiffs' "representation should invoke consideration similar to a contingent fee case," that "the Court will treat all claims as related," and "[n]one of plaintiffs' fees will be disallowed for unsuccessfully pursuing an unrelated claim," and that "the length of time from the filing of the suit to its conclusion and the travel involved for all of plaintiffs' attorneys" made the case "undesireable," nevertheless "... the Court has reduced the amount that plaintiffs may require the union and/or the defendants to pay for plaintiffs' attorneys based on the results obtained and the amount in controversy." In fact, of course, the trial court cut counsels' hours by nearly 40% and counsels' hourly market rates by 25%,

eliminated any contingency factor in a case that required one, and then reduced that already depleted base fee by another 60%, thus lowering plaintiffs' counsels' petitioned fee by 85% to an award that computes at $26.25 per hour.

Steelworkers' Status

Petitioner in No. 86-372 asserts that it is "not a party to the lawsuit," its "limited intervention was exhausted with the resolution of the 'member' issue," it was "not a party to the litigation on the merits," that it "did not participate at the trial," and that upon the filing of plaintiffs-respondents' fee petition it "intervened once again, this time to resist the fee award ...," and to renew "its contention that plaintiffs were not 'members' entitled to prosecute this §501(b) action." (No. 86-372 Pet. 4,6 & n. 5) At

the outset of its argument for granting the writ on the attorneys' fees issues, it again remarks that it was "not a party to this litigation." (No. 86-372 Pet. 15)

In its original Reply Brief in Support of Certiorari in this Court, Steelworkers asserted at pp. 1-3 its party status, informing this Court that the trial court had permitted it to intervene, and that in the Court of Appeals, "USWA filed a brief as a party and presented oral argument as a party." [Emphasis suppled.] At pp. 7-8 of its June 6, 1984 decision on the merits (R. App. A-11-12), the trial court stated "[o]n June 12, 1980 the International filed a motion to intervene in this lawsuit for the special purpose of seeking a vacation of this court's order allowing plaintiffs to commence this action. The court allowed the International to intervene." Thereafter, having disclaimed party status during the §501 accounting hearing on the merits,

precisely because it wanted to avoid liability for fees and costs,[5] Steelworkers again reversed itself (Steelworkers' Brief in the Court of Appeals at pp. 1 & n. 1, 17 n. 13) because it wanted party status in order once again to petition this Court on the "membership" issue, in the event it was unsuccessful in the Court of Appeals. Whatever Steelworkers tactical motive, its behavior reflects that "[i]t has also been the moving force behind most of the work in defense of this suit."

Steelworkers' unresponsiveness to the individual petitioners' misappropriations, both before and during the §501 proceedings, has been readily apparent throughout this case. Rather than sue for an accounting,

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[5] Steelworkers' recurring point in opposition to a fee award against it in the trial court was that it was not a party to this action. (Steelworkers' Brief in Trial Court at pp. 2-4 & n. 2, 5, 6-9, & 22-25) That argument was abandoned in its Brief in the Court of Appeals.

Steelworkers obstructed and delayed the §501 suit in every conceivable fashion, while the individual petitioners' attorneys successfully defended them against a limited criminal indictment covering only a few thousand dollars of the total misappropriation of strike money. None of the $40,000-plus trip money was part of the indictment. Further, the checks taken for purposes such as house payments, car payments, and medical bills, which were pocketed personally by the strike leaders,were not part of the indictment.

The record reveals just how resistant Steelworkers was to effective investigation and revelation of the individual petitioners' wrongdoing. Close examination of portions of a Steelworkers' affidavit reveals a complete avoidance of vigorous union investigation. Specifically, the Steelworkers' Streigel did not proceed directly to work auditing the local. The

Steelworkers' Frankel and Streigel took two to three weeks to schedule a conference with their auditor. A check on expenditures was delayed until after receipt of the Ward affidavit. Further evidence of possible fiduciary violations was resisted, and its provider's motives were attacked. The Steelworkers' Frankel committed himself to inform plaintiffs-respondents' counsel of preliminary audit findings, yet this was never done, and the proposed audit was falsely characterized as "in progress." The Steelworkers' Streigel and Steinbaugh did not act at all until a full month after the Ward affidavit's receipt, and no explanation has ever been offered for their failure to act or for why the use of a private accounting firm excluded an immediate audit check. Upon filing of the Steelworkers' Streigel affidavit in August, 1984 it was revealed that ordinary audit between 1978

and 1980 of the Local had been backlogged for months.

Nor was Steelworkers cooperative in obtaining the relevant union records for plaintiffs-respondents. Those records were obtained by subpoena and inspection in the parallel fair representation action of U.S. Department of Labor records in Atlanta on August 11-12, 1981. An affidavit of the inspection and its results was filed thereafter in this case, and it became one of the bases for plaintiffs-respondents' successful motion to amend their complaint, upon return of this case to the trial court, to cover all strike-fund payments.

Finally, Steelworkers alleged non-participation upon return of the case to the trial court is disingenuous; it never produced the documents set forth in its Streigel affidavit until after the §501 merits hearing, even though those documents had been subpoenaed; it never offered to

produce Streigel for deposition prior to trial; it provided documents and its outside accountant Mr. Prystash, only upon plaintiffs-respondents' counsel's repeated insistence; and individual petitioners' witness, Steelworkers District Director Strevel did everything he could to excuse, justify, and exonerate the individual petitioners' §501 violations at the hearing on the merits.

REASONS FOR NOT GRANTING THE WRIT

I. The Membership Issue

The same arguments respecting membership in the union were presented to this Court upon petition to review Erkins v. Bryan, 663 F.2d 1048 (11th Cir. 1981), and that petition was denied. 459 U.S. 989 (1982). Petitioners state that the matter was then interlocutory, but the facts were

finally found, stipulated upon remand in the trial court, and reaffirmed by the appellate court in this case. Erkins v. Bryan, 785 F.2d 1538, 1542 (11th Cir. 1986). Thus the case comes to this Court in no different posture than it did in 1982.

Steelworkers opine that the definition of membership applied in this case substantially burdens all unions as well as the case load of the federal courts. Neither proposition is true. The constitutional definitions of eligibility for membership and limitations upon membership in various unions affiliated with the AFL-CIO are as varied as are the politics and identities of the unions so affiliated. The interplay between the statutory definition of membership under the Landrum-Griffin Act and the constitutional membership provisions of various unions will always differ from case to case depending upon the facts of each case, the

constitutional provisions involved, the substantive Landrum-Griffin rights being asserted, and the membership provisions of the Act. It is to construct a strawman for the Steelworkers to contend that the highly factual construction of "membership" in the instant case constitutes a per se rule respecting all membership in all unions for all purposes. Moreover, in order to construct the strawman, Steelworkers have assumed that full statutory "due process" provisions must be applied in order administratively, as an intra-union matter, to accomplish a suspension or termination of membership for non-disciplinary reasons such as final termination of local union existence and bargaining status. No case so holds. For these reasons, Steelworkers' contentions respecting the practical impact of the decision below upon the administration of labor unions are illusory.

The Steelworkers also contend that the "membership" determination below will greatly burden the federal district courts in their statutory obligations respecting the fiduciary duties of union officials. However, the balance struck by Congress respecting the tension between union members' access to the federal courts and union officials' duties to be honest is a balance that under §501(b) vests substantial discretion in federal district court judges as to whether or not the grant leave to proceed. Indeed, the door to federal court is more closely guarded by §501(b) than it is in any other kind of federal district court civil litigation. Thus, there is no undue burden upon the federal courts by virtue of the decisions of either the Eleventh Circuit or the trial court.

Steelworkers' and the individuals' petitions argue for a certain construction of the membership definitional provisions of

the Landrum-Griffin Act, so that fulfillment of the requirements for membership in a labor organization is a functional category based on intra-union constitutional membership status at the time of commencement of the litigation. On the basis of the actual facts of record in this case, whether any court prefers the Steelworkers' construction of the Act is irrelevant, because Erkins and Denson satisfied even the Steelworkers' requirements for membership. To phrase it differently, the Court of Appeals originally did not premise its decision on a purely temporal reading of the statute but rather upon all the factual variables demonstrating membership on this record. Indeed, the reason that this case is actually a mine-run case respecting the statutory meaning of "membership" is because virtually every federal court that has considered "membership" has followed the approach of

examining all factual and union constitutional variables respecting membership and then deciding each case on its own particular facts. See, e.g., Alvey v. General Electric Company, 622 F.2d 1279 (7th Cir. 1980); Hughes v. Local Eleven International Association of Bridge Workers, 287 F.2d 810 (3rd Cir. 1960); Basilicato v. International Alliance, 479 F. Supp. 1232 (D. Conn. 1979); Axelrod v. Stoltz, 264 F. Supp. 536 (E.D. Pa. 1967).

Steelworkers' and the individuals' petitions seek to present a supposed conflict between the foregoing decisions and the Sixth Circuit's decision in Taylor v. Great Lakes Seaman's Union, Local 5000, 701 F.2d 590 (6th Cir. 1983). However, as Taylor recognizes, 701 F.2d at 592, and as petitioners seek to minimize or ignore, "Brennan and Alvey involved former union members whose employment within their unions' jurisdiction had been terminated

involuntarily through ... replacement of striking workers ...," and "Steelworkers' membership policy presently in dispute would not apply to persons whose positions were similar to those occupied by the Brennan and Alvey plaintiffs." Characterizing this distinction as "crucial," the Sixth Circuit also continues on to remark the nature of that case as one under §101(a)(1) of LMRDA and to note the reasonableness of the union's rule on the issue of membership for voting purposes under LMRDA. Of course, the issue in the instant case concerns reasonableness of the definition of membership with respect to §501(b) enforcement in a local union dormancy setting, an issue as to which there is absolutely no conflict amongst the Courts of Appeals.

II. The Timeliness Issue

Individual petitioners in No. 85-2077 argue that this Court's decision in Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), should be applied to §501(b) equitable accounting actions. Petitioners can point to no decisions of this Court or of any Court of Appeals conflicting with the trial court's and the Court of Appeals' decision that "[t]he cause of action under consideration here is quite different from those described and we conclude that the limitation period for filing a §501 action is not governed by Del Costello, Erkins II, or Davis. Erkins v. Bryan, 785 F.2d 1538, 1543 (11th Cir. 1986). The case law is unanimous that §501(b) equitable accounting proceedings are governed by laches as 'an appropriate test for timeliness[,]' Morrissey v. Curran, 482 F. Supp. 31, 40 (S.D. N.Y. 1979), Yoblonski

v. U.M.W., 80 L.R.R.M. (BNA) 2594 (D. D.C. 1971), [s]ince a §501 suit for an accounting is essentially equitable in nature ...." Erkins v. Bryan, 785 F.2d 1538, 1543 (11th Cir. 1986), citing, Local 92, International Association of Bridge Workers v. Norris, 383 F.2d 735, 741 (5th Cir. 1967). That law in turn is consistent with this Court's decision in Holmberg v. Armbrecht, 327 U.S. 392 (1946), as the Erkins Court recognized. Id.

There is yet a further reason to deny the petitioned writ on the timeliness question, and that is because, as respondents have described in their Statement of the Case, the trial court determined and the Court of Appeals accepted that this action was commenced May 1, 1980, less than six months after plaintiffs-respondents' discovery on December 1, 1979 of the cancelled checks of April and May, 1978, which provided the factual basis for

pursuit of their §501(b) case. Thus, even if Del Costello and its progeny applied to §501(b) equitable accounting proceedings, there would be no basis for reversal.

III. The Attorneys' Fees Issue

Both the individual petitioners in No. 85-2077 and the Steelworkers petitioner in No. 86-372 assail decisions of the trial court, Erkins v. Bryan, 598 F. Supp. 240 (M.D. Ala. 1984), and the Court of Appeals, Erkins v. Bryan, 785 F.2d 1538, 1544-49 (11th Cir. 1986), that they "pay $42,000.00 for plaintiffs' attorneys' fees." Petitioners claim that the fee award decisions conflict with the plain language of §501(b), its legislative history, this Court's decision in Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967), and the Sixth Circuit's decision in Shimman v. Local 18, International Union of

Operating Engineers, 744 F.2d 1226, 1235 n. 13 (6th Cir. 1984). On all points, the petitioners are in error.

The "plain language" argument has repeatedly been rejected by this Court in the context of LMRDA because, as the Court of Appeals noted, 785 F.2d at 1547, "LMRDA reflects 'calculated ambiguity [and] political compromise' rather than a precise congressional directive." See, Hall v. Cole, 412 U.S. 1 (1973).

The legislative history argument fails because "we can never be sure, in the absence of an explicit statement, why Congress fails to act[,]" and because it, too, was the product of "calculated ambiguity [and] political compromise." For example, Steelworkers' recitation of the legislataive history fails to consider inter alia the important developments that occurred in the House Labor Committee in reporting the Elliott bill, H.R. 8342, 86th

Cong., 1st Sess. (1959) to the House, when key sponsors of the legislation, speaking of the fee recovery enforcement remedial provisions of §501 of that bill, a bill identical in that respect to the Landrum-Griffin bill, H.R. 8400, and substantially similar in that respect to original §109(b) of the Kennedy-Ervin bill, s.1555, stated in their Supplemental Views:

> The bill also authorizes a union member to bring an action against any official or agent who violates his fiduciary obligations, if the union refuses to sue -- and again such member may recover counsel fees and costs if he prevails. [Emphasis added.]

H. Rep. No. 741 on H.R. 8342 (July 30, 1959), 1 Leg. Hist. of LMRDA of 1959 at p. 840 (NLRB 1959). Those Supplemental Views are extremely important because they were expressed by key supporters of the "realist" labor position in the House, Reps. Carl Elliott, Edith Green, Frank Thompson,Jr., Stewart L. Udall, and James G. O'Hara, and thus they likely carried to the

floor and the conference this understanding of §501. This sequence of events is not unlike that analyzed by the Supreme Court in Hall, 412 U.S. at pp. 11-14 & nn. 17-19, and strongly suggests that key sponsors and supporters of the Elliott legislation believed that the identical provisions of the Landrum-Griffin legislation "allowed the union member to recover counsel fees." Hall, 412 U.S. at p. 12 n. 19.

The supposed conflict between this Court's decision in Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967), and the decision below was repudiated by the Court of Appeals, 785 F.2d at 1546-47, because "[t]he remedies provided under §501 of the LMRDA do not approach the specificity of those considered in Fleischmann, an action for trademark infringement under the Lanham Act ...," and §501 "hardly sets forth the comprehensive remedies found in the Lanham Act." Moreover, other decisions of this Court illuminate the limited bearing of Fleischmann upon §501 fees. Not the least of the reasons for declining to grant Steelworkers' petition is the decision of this Court in Hall v. Cole, 412 U.S. 1 (1973). In Hall the Court held that a

prevailing LMRDA Title I "Bill of Rights" claimant could recover a full award of attorneys' fees for his "free speech," non-monetary victory, notwithstanding the absence of statutorily express language authorizing the award. The Court reasoned that the correction of "free speech" abuse by the particular intra-union political claimant was a correction benefitting the entire union membership and remarked in particular the important LMRDA purpose of exposing fiduciary abuse by union officials. Hall, 412 U.S. at 6-7 & n. 7. The Court noted the analogy between the conferral of a common non-monetary benefit upon the union membership in Hall and the conferral of a common benefit in pre-Hall common benefit fee award cases, Hall, 412 U.S. at 6-7, 12-13, and the equity basis for such an award, Hall, 412 U.S. at 5, and emphasized the statutory enforcement purposes of private party LMRDA litigation. The Court further noted the express statutory authorization for such an award in §501 litigation, thereby confirming that provision's a fortiori alowance for fee awards. Hall, 412 U.S. at 11-12 & n. 17. Hall is particularly devastating to the Steelworkers' petition for two reasons: (1) it expressly

incorporates the non-monetary common benefit rationale developed in shareholder derivative suits and recognized by this Court in Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), into LMRDA fee analysis, and §501(b), of course, was patterned after private enforcement in such derivative litigation, see, e.g., Phillips v. Osborne, 403 F.2d 826, 831-32 & n.8 (9th Cir. 1968), Brink v. DaLesio, 453 F. Supp. 272, 279-80 (D. Md. 1978); and (2), it expressly considered and rejected the applicability to LMRDA remedies of the rationale of Fleischmann that "meticulously detailed" remedies serve to limit otherwise generally available equitable fee-shifting powers of the federal courts, a rationale that serves as the linchpin of Steelworkers' analysis that the decision below conflicts with Fleischmann. Hall, 412 U.S. at 9-14. Because Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), was decided after Hall it is not specifically distinguished, but as the D.C. Circuit says, "Hall extends Mills to an express statutory [LMRDA] cause of action. This development remains undisturbed after Alyeska because the "common benefit" rationale was not involved in that case, and [this] Court made

clear that 'Congress has not repudiated the judicially fashioned exceptions to the general rule against allowing attorneys fees.' With respect to LMRDA courts have uniformally applied a 'common benefit' analysis to award attorneys' fees to private litigants." Usery v. Local 639, I.B.T., 543 F.2d 369, 382 & n.31 (D.C. Cir. 1976).

The Fleischmann rationale was also rejected in Mills, a shareholder derivataive suit enforcing provisions of §14(a) of the Securities Exchange Act of 1934, and seeking an interim award of fees, by citation to the fee rationale of the then leading §501(b) decision, Bakery and Confectionary Workers v. Ratner, 335 F.2d 691, 696-97 (1964), for the proposition that "we [eight members of the Court] cannot fairly infer from the ... Act ... a purpose to circumscribe the courts' power to grant appropriate remedies." The same 8-1 Mills majority also cited the §501(b) fee award decision in Highway Truck Drivers Local 107 v. Cohen, 220 F. Supp. 735 (E.D. Pa. 1963), for the propositin that "petitioners [shareholders] ... [were] entitled to an interim award of litigation expenses and reasonable attorneys' fees." Mills, 396 U.S. at 389, 391, 393-97. See Donovan v. CSEA Local

Union 1000, 784 F.2d 98, 104 (2nd Cir.), cert. denied, _____ U.S. _____, 55 U.S.L.W. 3219 (1986).

Petitioners also argue that the decision below conflicts with Shimmon v. Local 18, International Union of Operating Engineers, 744 F.2d 1226, 1235 n. 13 (6th Cir. 1984). Shimmon, of course, is not a §501(b) suit, but rather a free speech and assault suit, and as the Court of Appeals noted, 785 F.2d at 1548-49, "Shimmon's primary benefit, in the sum of $225,000.00 ran solely to the named plaintiff .... Any incentive for change in union policy was largely ancillary to plaintiff's' personal recover. Here, in contrast, the monetary recovery, as well as the incentive to change, directly concerns USW rather than the plaintiffs."

Indeed, the twenty-year long line of authority construing §501(b)'s fee award provision is unbroken that the amount recovered does not limit the fee award available under the common benefit rationale. Not a single federal judge of the approximately thirty to have considered this question has agreed with Steelworkers' analysis. Local 92, International Association of Bridge Workers v. Norris, 383

F.2d 735 (5th Cir. 1967); Morrissey v. Curran, 483 F.2d 480 (2nd Cir. 1973); Johnson v. Nelson, 325 F.2d 646 (8th Cir. 1963); Kerr v. Shanks, 466 F.2d 1271 (9th Cir. 1972); Milone v. English, 306 F.2d 814 (D.C. Cir. 1962); Bakery and Confectionary Workers v. Ratner, 335 F.2d 691 (D.C. Cir. 1964); Ratner v. Bakery and Confectionary Workers, 354 F.2d 504 (D.C. Cir. 1965), aff'g. Moschetta v. Cross, 241 F. Supp. 347 (D. D.C. 1964), on remand from 335 F.2d 691, supra; Usery v. Local 639, I.B.T., 543 F.2d 369 (D.C. Cir. 1976); Monzillo v. Biller, 735 F.2d 1456 (D.C. Cir. 1984); Highway Truck Drivers & Helpers Local 107 v. Cohen, 220 F. Supp. 735 (E.D. Pa. 1963); Retail Clerks Local 648 v. Retail Clerks International Association, 299 F. Supp. 1012 (D. D.C. 1969); Philadelphia Div. v. Pennsylvania Tel. Guild, 573 F. Supp. 314 (E.D. Pa. 1983); and, of course, Erkins v. Bryan, 598 F. Supp. 240 (M.D. Ala. 1984), aff'd, 785 F.2d 1538, 1544-49 (11th Cir. 1986). As Judge Hobbs put it, "courts have consistently rejected the unions' contentions that counsel fees should be limited to the amount of the monetary recovery." See, generally, Comment: Counsel Fees For Union Officers Under The Fiduciary

Provision Of Landrum-Griffin, 73 Yale L. J. 443, 468-71 & nn. 119-130 (1964).

CONCLUSION

For the reasons set forth above, the petitions for writs of certiorari in No. 85-2077 and No. 86-372 should be denied.

Respectfully submitted,

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